It is true that the Plaintiff in complying with the conditions imposed by the Jabatan Perkhidmatan Bomba Pulau Pinang had incurred substantial expenses and the Defendants have been aware of her intention to engage in the trade concerned on the said premises right from the start. Mr. Karpal Singh stressed this aspect of the case. However, assuming it were necessary to decide this question of balance of convenience I would regard the wide public interest of ensuring the safety of adjoining houses and their occupants as decisive. The case of *Roussell-UCLAF* v. *G.D. Searle & Co.*[10] supports this view. In that case the plaintiff alleged that a drug marketed by the defendant infringed the plaintiff's patent. The defendants replied that the drug had life-saving qualities and it was greatly in the public interest not to restrain the sales at the interlocutory stage. The injunction was refused.

Whether or not the Plaintiff would be entitled to damages is a question which does not arise in these proceedings and I express no opinion upon it.

For the reasons stated, I would dismiss this application with costs.

Application dismissed.

Solicitors: *Karpal Singh & Co.; Presgrave & Matthews.*

THE "MELANIE"
W.N. MAZZAROL v. UNITED ORIENTAL ASSURANCE SDN. BHD., KUANTAN

[O.C.J. (George J.) October, 1982]

[Kuantan – Civil Suit No. 58 of 1978]

Insurance – Insurance of vessel – Vessel grounded at sandbar at mouth of Kuantan River – Alleged failure to disclose fact that vessel had previously been grounded – Information given to agent of insurance company – Whether grounding a peril insured against – Whether there was total loss of vessel – Whether vessel was seaworthy – Plaintiff alleged to be incompetent or not qualified to navigate the vessel in area where she hit the sand bank – Want of due diligence.

Shipping Law – Marine Insurance – Insurance of vessel – Whether grounding a peril insured against

In this case the plaintiff was the owner of a vessel which he used as a pleasure yacht. He had sailed the vessel from South Australia to Singapore and from there to the East Coast of Peninsular Malaysia. He had anchored the vessel about 500 yards south of the river mouth but in the night the sea dragged the anchor and the vessel was left grounded. He subsequently managed to pull the vessel clear. Later he insured the vessel with the defendants, through an agent of the defendants. He had told the agent of the earlier grounding but this was not stated in the application. The vessel was taken out to sea by the plaintiff and when returning into the river the vessel came into contact with the sandbar at the mouth of the river and was grounded. The vessel could not be salvaged. The plaintiff claimed the insured sum of $50,000. The defendant company denied the claim on the following grounds:

(a) In seeking the cover there was failure to disclose the vessel had been grounded or beached on or about November 20, 1977 and thereby the defendant company was entitled to avoid the policy;

(b) The grounding of the vessel on the sandbar on December 30, 1977 was not a peril insured against;

(c) there was neither actual total loss nor constructive total loss;

(d) even if there was such a loss it was caused by the vessel being unseaworthy in that the plaintiff was not competent or qualified to navigate the vessel in the area where she hit the sand bank.

In any event the accident was caused by want of due diligence on the part of the plaintiff that entitled the defendants to deny the claim.

Held: (1) on the basis of the format of the defendant's proposal form given to the plaintiff to complete and the fact that the plaintiff had informed the agent of the earlier incident of grounding, there was neither misrepresentation made to the company nor concealment of material facts and the statement and particulars given by the plaintiff in the proposal form were true and as complete as required by the company. There was therefore no non-disclosure that entitled the defendant to avoid the policy;

(2) in this case the vessel coming into contact with the sandbar and thereafter being pushed by the wave further up the bar where she was stranded was a peril of the sea and was covered by the policy;

(3) in the circumstances obtaining in Kuantan in January 1978 a prudent uninsured owner would have done exactly what the plaintiff did and would have abandoned the stranded vessel. Accordingly for all practical purposes the vessel was a total loss;

(4) there was no want of diligence on the part of the plaintiff that entitled the defendants to avoid the claim. The accident could have happened even to the Port Pilot simply because the position of the sand bar was not static. The argument that the plaintiff's lack of knowledge of the channels was such that his taking out the vessel rendered it unseaworthy had no merit;

(5) judgment should be given for the plaintiff in the sum of $50,000 with interest.

Cases referred to:

(1) *Ayrey* v. *British Legal and United Provident Assurance Co.* [1918] 1 K.B. 136, 141.

(2) *Wyndham Rather Ltd.* v. *Eagle Star & British Dominions Insurance Co. Ltd.* (1925) 21 Ll. L.R. 214, 215.
(3) *Magnus & Others* v. *Buttemer* 138 E.R. 720.
(4) *Gregson* v. *Gilbert* (1783) 3 Doug. K.B. 232; 99 E. R. 629
(5) *P. Samuel & Co. Ltd.* v. *Dumas* [1924] All E.R. 66.
(6) *Roux* v. *Salvador* 132 E.R. 413, 420.
(7) *Angel* v. *Merchants' Marine Insurance Co.* [1903] 1 K.B. 811.
(8) *Boon & Cheah Steel Pipes Sdn. Bhd.* v. *Asia Insurance Co. Ltd. & Ors.* [1973] 1 M.L.J. 101.

CIVIL SUIT.

Shah Balendran for the plaintiff.
Wilfred S.J. Abraham for the defendants.

Cur. Adv. Vult.

George J.: The plaintiff is an Australian and resides at a town called Burnside in South Australia. His hobby for some 10 years before the writ was filed has been sailing which obviously he takes seriously to the extent that he had been taken a 6 months' correspondence course in (what he called) celestial navigation and chart reading and had built his own motor sailor which he used as a pleasure yacht. This vessel named the "Melanie" had a ferro-cement hull, weighed 10 tons and had a length of about 10 meters. At least three figures were given as being the draft the vessel drew. On the probabilities I found as a fact that the draft the vessel drew was 5 feet 9 inches. The plaintiff can be said to have proved his competency as a boat-builder and a sailor by solo-sailing the "Melanie" from her home base in Australia to Singapore and from there along the East Coast of Peninsula Malaysia up to the approaches of the Sungai Kuantan, without any mishap. He had with him various aids to navigation including a chart of the East Coastal waters to scale 1:500,000. Charts to scale 1:25,000 were available for purchase in Singapore but the plaintiff did not avail himself of such more detailed charts.

It was on or about November 20, 1977 that the plaintiff arrived in the "Melanie" at the approaches to Sungai Kuantan. He did not enter the river but dropped anchor about 500 yards south of the river mouth and obtained a lift into the river in a passing fishing boat.

During the night the sea came up and dragged the anchor (and the vessel) closer to the shore and when the tide went out the "Melanie" was left grounded in low water. It some 4 or 5 days later that the plaintiff was able with the help of a fishing boat, at high tide, to pull the "Melanie" clear and she was towed into the river and anchored in the deep waters at the fishermen's jetty.

On behalf of the defendants it was suggested to the plaintiff that the "Melanie" had been damaged when it was washed aground but this was denied and in the absence of any evidence on the point other than that of the plaintiff and that of PW4 Jimmy Ooi I found as a fact that the "Melanie" was not damaged in that incident.

The "Melanie" had not been covered by any form of insurance in its voyage to Kuantan. At Kuantan the plaintiff met a compatriot of his named Cassidy who was also a sailing enthusiast who arranged for one V. Thandayuthapany (PW2), an employee of the defendant company, to attend on the plaintiff. PW2 brought along with him a proposal form which was completed by the plaintiff and is exhibit AB20-21 pursuant to which the defendant company issued a cover note covering the hull of the "Melanie" and her machinery in the sum of $50,000 effective from December 15, 1977.

PW2 had been told of the earlier grounding of the "Melanie" but he did not consider that information as relevant to the application for an issue of cover on the vessel. However, PW2 apparently said that he would like to have a look at the boat and there is evidence that he did go up to the fishermen's jetty where he had what appeared to be a cursory look at the "Melanie" riding at its anchorage there.

The Sungai Kuantan is a river fed by a number of tributaries and has a wide estuary that has a depth in some places of 3 fathoms and thus can and does take in ocean-going vessels. However, at the approaches to the estuary from the sea is an extensive sand bar most of which is submerged. Navigation into the river is by means of a narrow channel in the sand bar. The position of the channel and the character of the sand bar changes from time to time presumably as a result of the effect of the tides, winds and waves and the flow of water out of the Sungai Kuantan. Sea-going vessels are taken through the channel, into and out of the river, by a pilot employed for that purpose by the Marine Department.

The position of the channel is shown by what are known as marker buoys. The point from which a vessel coming in from the sea should make

for the channel, is marked by what is known as the Fairway Buoy. The approaches to the channel itself is marked by the Outer Buoy and the end of the channel (and the beginning of the deeper waters in the river) is shown by the Inner Buoy. Encik Anandarajah (PW3) the Deputy Port Officer, Kuantan, testified that the approach to the channel from the open sea is by sailing south of the Outer Buoy. He also said that the Port Pilot brings in ships, sailing about 100 meters south of the Outer Buoy. The plaintiff testified that he had been advised by the Marine Department that the approach to the channel was 200 meters south of the Outer Buoy. Later in his evidence he clarified that to mean within 200 meters south of the Outer Buoy. No issue was taken of this statement.

On December 30, 1977 at about 1.00 p.m. the plaintiff took out the "Melanie" from the jetty in the river, out to sea. The sea was calm and on board were two friends of the plaintiff, one of whom is PW4 Jimmy Ooi. They did some fishing and also went up to a wreck that could be seen off the Hyatt Hotel. At about 3.30 p.m., running on the engine, they returned to the approaches of the Sungai Kuantan, went past the Fairway Buoy without mishap, but as they were going past the Outer Buoy the "Melanie" came into contact with a portion of the sand bar on which she stuck fast. The plaintiff did not think that the vessel was damaged but he could not get her off and the waves kept pushing her southwards further on to the sand bar. The tide was running out and as the water was getting lower the waves were getting higher as apparently waves running over shallows pick up more speed. The waves began to come over the side and into the boat which was rocking from side to side on her keel. Eventually she listed and lay on one side. The plaintiff and his companions could not do anything for the yacht and they made for the shore using the yacht's life raft. Later a couple of attempts were made by the plaintiff to board the yacht but the sea was too rough.

The plaintiff testified that he had tried to but could not find anyone who "could pull out the boat". By January 3, 1978 the plaintiff came to the conclusion that the ship was beyond salvage and he then made out his "statement of facts" and submitted it together with a sketch location plan to the defendant company as well as to the Marine Department at Kuantan. On behalf of the plaintiff Encik Anandarajah, the Deputy Port Officer, Marine Department, Kuantan testified that on January 7 or 8, 1978 he went out to inspect the "Melanie" and managed to get to about 20 or 30 yards of her. According to him, at high water the boat was completely submerged and at low water three quarters of the boat was under water. Encik Anandarajah was of the opinion that the boat could not be salvaged as the necessary facilities were not available. He was of the view that a salvage barge had to be used and the nearest available barge was in Singapore. He thought that it would cost between $20,000 and $30,000 to get a salvage barge to come up to Kuantan from Singapore during the off-monsoon period. During the monsoon season it would cost more.

On February 14, 1978 a professional Marine Surveyor who had Master's papers, Chan Peng Sum, DW1, on the instruction of the defendant company took a statement from the plaintiff (which was not put in as evidence as a result of objection by counsel for the plaintiff).

Chan Peng Sum had made enquiries as to what it would cost to lift up the vessel and put it upright again and testified that it would cost between $30,000 and $35,000. This did not include the cost of repairs and replacement. Chan also testified that if the "Melanie" had shipped water and was left aground in the channel "for a week or so the equipment inside e.g. radio, furnishings and fittings would be a total loss. The engine could possibly be salvaged." It was his view that when he saw the vessel in February 1978 it was not economical to salvage the "Melanie".

No attempt to salvage the vessel was made and some months later the wreck was hauled out of the way.

The plaintiff's claim is for the insured sum of $50,000 damages, interest and costs. The defendant company denied the claim on a number of grounds. In disputing the claim the defendants contend that:

(1) In seeking the cover there was failure to disclose that the vessel had been grounded or beached on or about November 20, 1977 and thereby the defendant company was entitled to avoid the policy;

(2) The grounding of the "Melanie" on the sand bar on December 30, 1977 was not a peril insured against;

(3) There was neither actual total loss nor constructive total loss;

(4) Even if there was such a loss it was caused by the vessel being unseaworthy in that the plaintiff was not competent or qualified to navigate the "Melanie" in the area where she hit the sand bank.

In any event the accident was caused by want of due diligence on the part of the plaintiff that entitles the defendants to deny the claim.

I propose dealing with the said contentions in the same order that I have set them down above.

As to item (1), the format of the defendant company's proposal form seeks statements and particulars which the proposer is enjoined to give truly and completely. A warning in the format pointed out to the proposer that he is not to withhold any information that is calculated to influence the decision of the company in accepting the insurance. This is in keeping with the fact that contracts of insurance are made *uberrimae fidei* and that *caveat emptor* can be said to have no place in such contracts.

The defendants complain that the fact of the grounding of the vessel on November 20, 1977 was not brought to their attention and this non-disclosure, they say, was calculated to influence the decision of the defendants towards their accepting the insurance and that accordingly they are entitled to avoid the policy.

By the printed proposal form the defendants seek to know *inter alia* when the vessel was built, whether it has since been rebuilt or whether any major repairs had been carried out since it was first built. Further down in the proposal form the question is asked under the sub-heading "General", "Do you own any other vessels" to which the answer given by the plaintiff was "No". This was followed by "give details of accidents that occurred in the last four years to these vessels". Clearly "these vessels" have reference to "any other vessels" in the earlier question and if the answer to the earlier question was in the negative the question of details of accidents to those vessels would be irrelevant. The plaintiff answered it with a "No". The next question was "Any of these accidents relate to the vessel proposed for insurance?" The plaintiff answered it with a "N/A" meaning "Not applicable". If in fact the plaintiff did not own any other vessels, then accidents could not have happened to them and accidents that could not have happened could not relate to the vessel proposed for insurance.

It was submitted that the answers to the questions under "General" were incorrect in that the fact of the grounding of the "Melanie" on November 20, 1977 should have been disclosed. I disagree. The questions under "General" specifically avoid accidents to the vessel proposed for insurance other than accidents to it involving other vessels owned by the proposer. No place is provided in the proposal form for information of previous accidents to the vessel. Perhaps the earlier question put to the proposer "If vessel rebuilt or major repairs carried out give details" was calculated to give sufficient relevant information pertaining to accidents to the vessel for which cover was sought.

Now the plaintiff testified that he had not hidden away the fact of the earlier grounding of the vessel. He testified that the fright that that accident had given him was the motivating factor behind his seeking insurance cover and had said as much and disclosed that incident to PW2. PW2 admitted that he was told about the incident but he did not consider that relevant information. He was the only representative of the defendants that the plaintiff had contact with prior to the issue of the cover note.

I agree that when PW2 helped the plaintiff to complete the proposal form he was acting as the agent of the plaintiff. But in my view when he was given the information in respect of the earlier incident he received it as the representative of the defendants commissioned to deal with the plaintiff. In *Ayrey* v. *British Legal and United Provident Assurance Co.*[1], Atkins J. (as he then was) said, "The company seek to invalidate the policy on the ground that there was a concealment of material facts by the assured. The evidence shows that the company's agent was told by the assured that he was a member of the Royal Naval Reserve and therefore liable to be exposed to special risks, but he was described in the policy as a fisherman. The county court judge has found as a fact that that description was correct. Speaking for myself, I am not satisfied that there was, within the meaning of the clause in the policy or of the ordinary law of insurance, any concealment of the fact that the man's calling exposed him to special perils. The questions in the proposal form were all answered correctly, and I have great difficulty in seeing how it can be said that an assured, who correctly answers the questions in the proposal form and declares all the facts truly to an agent of the insurance company, has been

guilty of concealing material facts, though, having regard to condition 2 of this policy, it may be doubtful whether statements as to material facts made to an agent can be treated as if made to the company." Condition 2 of the policy referred to by Atkins J. was as follows:

"2. All statements made and acts done by any person other than the assured in connection with the proposals and warranties within referred to, or otherwise in connection with this policy shall be deemed as between the assured and the company, so far as the same shall be relevant hereto, to have been made and done by such person for and on behalf of the assured and not the company. This condition applies equally although such person be an agent of the company, the authority of such agent being hereby expressly declared not to include the acceptance of proposals, declarations or warranties, and shall be deemed to have been received by him as agent for the assured for the purpose of submitting the same to the company."

In the instant case there was no such condition expressed anywhere.

On the basis of the format of the Defendants' proposal form given to the plaintiff to complete, and the fact that the plaintiff had informed PW2 of the earlier incident I conclude that there was neither misrepresentation made to the company or concealment of material facts and the statements and particulars given by the plaintiff in the proposal form were true and as complete as required by the company, and I hold that there was no non-disclosure that entitles the defendants to avoid the policy.

As to item (2), whether the grounding on December 30, 1977 was a peril insured against, an examination of the terms and conditions of the policy is called for. Encik Shah Balendran's contention that the terms and conditions set out in the policy exhibit D6 are not binding on the plaintiff contradicts what is stated in the cover note and had no merit in logic as well as on authority – see *Wyndham Rather Ltd.* v. *Eagle Star & British Dominions Insurance Co. Ltd.*[2]. See also paragraph 284 of the 6th Edition of *Macgillivray & Parkington* on Insurance Law at page 282.

Now, the cover provided by the policy is stated to be "Touching the Adventures and Perils (various specified perils are set out) and or all other Perils, Losses and Misfortune ..... to the hurt detriment or damage of the subject matter." This is followed by a warranty excluding the consequences of hostilities but the warranty is stated not to exclude "collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather ..... " The Institute Standard T.L.D. Clause which is applicable in this case specified various kinds of perils for which cover is provided and includes negligence of the Master with a proviso which excludes loss that has resulted from want of due diligence by the assured (which aspect of the matter will be considered later in this judgment).

Encik Wilfred Abraham has argued that the "Melanie" coming into contact and being grounded on the sand bank is not a peril of the sea and accordingly was not covered by the policy. He cited *Magnus & Ors.* v. *Buttemer*[3] and *Gregson* v. *Gilbert*[4]. But the case on point is *P. Samuel & Co. Ltd.* v. *Dumas*[5] cited by Encik Shah Balendran. In his judgment Viscount Finlay at page 81 found favour with a passage from a judgment of Lord Herschell:

"I think it is clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea."

The issue in *Magnus* was whether the ship could be said to have stranded where she was placed in a tide harbour for the purpose of unloading and took the ground at the spot where she had been placed, on the falling of the tide. It was held that on those facts it cannot be said to be something fortuitous that had happened and was not a peril of the sea. On the falling of the tide she was apparently expected to be grounded although damage by such grounding was not expected.

In the instant case the plaintiff was taking the "Melanie" into the channel the location of which was purported to be marked by the buoys placed there by the Marine Department, when she came into contact with portions of the submerged sand bar that should not have been there and was

grounded on it, which is a far cry from the not altogether unexpected situation in the *Magnus*. The horrifying facts in *Gregson* provided no help.

I am constrained to the view and hold that the "Melanie" coming into contact with the sand bar and thereafter being pushed by the waves further up the bar where she was stranded was a peril of the sea and was covered by the policy.

As to item (3), the issue is whether there was total loss. The cover was for total loss, actual or constructive.

On January 3, 1978 the plaintiff informed the defendants by exhibit AB page 1 that it was his view that the vessel was beyond salvage. The plaintiff testified that he had made enquiries at Kuantan for facilities to lift the boat and could not find any and it was then that he concluded that the vessel was beyond salvage. The question that has to be decided is whether the plaintiff was justified in concluding as he did.

It was the height of the monsoon and there is evidence that the only way in which the "Melanie" could have been lifted was by means of a salvage barge from Singapore which according to PW3 would have cost during the off-monsoon period from M$20,000 to M$30,000 and during the monsoon period somewhat more. DW1 had made enquiries and testified that it would have cost between M$30,000 and M$35,000. This did not include the cost of repairs and replacement. In his report (AB page 1) the plaintiff had stated that the fittings were completely destroyed or washed out. DW1 also testified that if the vessel had shipped water, in a week or so the equipment inside e.g. the radio and the furnishings and fittings would be a total loss. At that stage he thought that the engine could possibly have been salvaged. In his view by February the vessel was beyond salvage.

I think that it is useful to consider the principles of the doctrine of abandonment. In *Roux* v. *Salvador*[6] the doctrine is discussed:

"It is, indeed, satisfactory to know, that however the laws of foreign states upon this subject may vary from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law. The underwriter engages, that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position, that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases – there may be a capture, which, though *prima facie* a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged, that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar cases, if a prudent man not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured."

In *Angel* v. *Merchants' Marine Insurance Co.*[7] Vaughan Williams L.J. pointed out that the "prudent uninsured owner" test was clearly accepted as the proper test at least down to 1873 and its recognition in later cases was such that to his mind the matter was beyond argument. He went on to consider criticisms of that test as not being valid in a day and age when competent salvage facilities are available. The learned Lord Justice said at page 819 of the report,

"The contention seems to be that the old test of a "prudent uninsured owner" was adopted at a time when there was no telegraph and the means of communication were difficult, and at a time when there was no salvage association ready to step in to salve the ship and take charge of her until she could reach a port where permanent repairs could be effectively executed, and where, therefore, the cost of the repairs could be measured either by the actual execution of the work or by reliable estimates obtained on invitations to tender. It is said that, at the time of the adoption of the "prudent owner" test, the master, through difficulty of communication and inability to secure with any certainty means of repair, was in practice apt to consider seriously the question whether he should sell the materials of the ship, or the ship as she lay, rather than make the attempt to repair. But it is said that nowadays such a case rarely arises, and that when it does the old test can be applied; but that now the conveniences of modern times, telegraphic communication, the salvage associations, and Lloyd's agents everywhere, throw on the master but rarely the old alternative, "repair or sell"; and that in modern times the shipowner ought to guide his conduct as an insured owner desirous to have regard to the interests of all concerned, and that the damaged ship ought, whenever it is possible, to be taken to the port where permanent repairs can be effected, and the arithmetical test applied with something like precision."

But he was not in favour of altogether disregarding the old test. He went on to say in respect of the suggestion that the "arithmetical test"

should supersede the "prudent uninsured owner test",

"Such a rule seems to me too favourable to the underwriter. I think that this contention is open to the criticism that the shipowner at the moment of election, when he has to exercise the option of giving notice of abandonment, has really no precise data upon which to act, and that there must always be a quantity of items, especially the cost of the temporary repairs and the getting of the ship to the ports of temporary and permanent repair, as there were in the present case, which do not admit of precision. I doubt whether under the absolute arithmetical test the underwriter really takes upon him the whole of the risks of the perils of the sea."

Raja Azlan Shah J. (as he then was) in *Boon & Cheah Steel Pipes Sdn. Bhd.* v. *Asia Insurance Co. Ltd. & Ors.*[8] had considered both tests and he had opted, on the facts in that case, in favour of the "arithmetical test". But in doing so he was clearly not rejecting the "prudent uninsured owner" test out of hand. He said in answer to the submission that the prudent uninsured owner test should be applied, "I cannot subscribe to this view. In determining whether the cargo was a constructive total loss, the true test in the present case where the cargo could be looked at and the cost of repair estimated, is whether the cost of recovering, reconditioning and forwarding the cargo to the destination would exceed their value on arrival. The "prudent uninsured owner" test must be discarded." To my mind it follows that where the cargo could not be looked at and the cost of repairs estimated then the "arithmetical test" cannot be applied and resort has to be made to the other test. *Boon & Cheah* does not say otherwise. For all intents and purposes the vessel was lying at the bottom of the sea fully submerged at high tide and substantially submerged at low water. It had been buffetted by waves and forceably pushed further up the sand bar. Its hull may or may not have been holed and being made of ferro-concrete could not take the sort of buffetting that a steel hull would have taken. There were no local facilities for salvaging the vessel and to get a salvage barge out from Singapore would have cost M$30,000 to M$35,000 and the probabilities were that it might have been an action in futility.

In the circumstances obtaining in Kuantan in January 1978 I am of the view that a prudent uninsured owner would have done exactly what the plaintiff did and would have abandoned the stranded vessel. And accordingly I am satisfied that for all practical purposes the vessel was a total loss.

Which leaves item (4) to be considered.

There is evidence to show that the plaintiff's destination was Pattaya in Thailand (see AB17). The chart that the plaintiff had (D1) was not as detailed as it could have been but it does point out the dangers of the approaches to the mouth of the Sungai Kuantan and the evidence is that the plaintiff was aware of this – when he first arrived at the river mouth he chose to hove-to outside the river. On December 30, 1977 other boats (albeit smaller ones) were going in and out of the channel. The plaintiff had made enquiries at the Marine Department in respect of the position of the channel and had sought the advice of the fishermen before taking his vessel out which he did without mishap. PW2 expressed the view that the fishermen had a better knowledge of the channel (into the river) than even the Port Pilot stationed at Kuantan.

The accident occurred at a point within 200 meters south of the Outer Buoy. It did not occur between the Outer Buoy and the Inner Buoy. At 1530 hours when the accident happened, according to the evidence of DW2 the height of the tide was 1.1 meter or 3½ feet above what is known as Chart Datum. DW2 testified that the depth of water at 1530 hours on the day of the incident would have been between 9½ feet and 18½ feet in the area between the Fairway Buoy and Outer Buoy. DW2 also was of the view that at 1530 hours an allowance of 2 feet had to be given for the waves and if a net clearance of 1½ feet (18 inches) was available that was acceptable to him. The "Melanie" drew a draft of 5 feet 9 inches and if the 1½ feet clearance and the allowances of 2 feet for the waves are given, the effect of DW2's opinion is that there had to be a depth of 9¼ feet for the boat to sail through without mishap. But against this DW2 had also testified that according to the chart, at 1300 hours there would have been a depth of only 5½ to 6½ feet between the Outer Buoy and the Inner Buoy. But the "Melanie" had sailed through that area without mishap in putting out to see at 1300 hours. DW2 thought that that was due to luck. A more acceptable explanation is provided by DW2's evidence (at the end of his testimony) that apart from the tides, the depth of the water at the river mouth is influenced by the water coming down the river which, during the monsoon season, (it would appear) could be significant.

Printed in the chart D2 is a statement to the effect that the channel leading into the Sungai

Kuantan is subject to frequent changes but is marked by buoys which are changed as necessary. DW2 was of the view that a mariner was entitled to rely on the marker buoys which is what the plaintiff did. The portion of the sand bar that he came into contact with was in the lane marked for the passage of vessels and where the depth according to the chart should have been anything from 9½ feet (without taking into account the increase as a result of river water). It was a submerged sand bar which must have been formed in the frequent changing of the sand formation. I fail to see what the plaintiff could have done to have avoided the accident apart from not venturing out at all on that day. The impression I have obtained is that in doing so there were risks but it having been a calm day, it was not unreasonable that he did venture out. I have failed to find any "want of diligence" on the part of the plaintiff that entitles the defendants to avoid the claim. The accident could have happened even to the Port Pilot simply because the position of the sand bar is not static. The argument that the plaintiff's lack of knowledge of the channels was such that his taking out the vessel rendered it unseaworthy has no merit.

There will be judgment for the plaintiff and in the sum of M$50,000. The plaintiff had by his solicitors' letter of February 14, 1978 given the defendants 3 days to pay and settle the M$50,000. Accordingly interest on the judgment sum at 8% per annum should run from February 18, 1978 until realisation and I so order. The defendants will also pay the costs of the plaintiff as taxed by the proper officer of the court.

Claimed allowed.

Solicitors: *Balendran, Chong & Bodi; Shearn Delamore & Co.*

KHAU DAW YAU v. KIN NAM REALTY DEVELOPMENT SDN. BHD.

[O.C.J. (George J.) December 1, 1982]

[Kuantan — Civil Suit No. 256 of 1978]

Contract – Contract for purchase of land – Booking applications signed – Terms and conditions of booking set out in document – Action for specific performance – Application for sub-division of land – Special condition imposed that portion of land reserved for bumiputra – Whether performance of contract has become impossible or unlawful and further performance excused – Offer made by persons not registered owners – Whether contract illegal.

Land Law – Contract for purchase of land – Portion of land reserved for bumiputra – Whether contract illegal.

In this case one Tengku Sepiah was the registered owner of a piece of land which she sold and transferred to Futo Trading Sdn. Bhd. who was to develop the land for building. Futo Trading Sdn. Bhd. made an arrangement with the defendants for the development of the land. The defendants were themselves the registered owners of another piece of land and this also was to be developed for building. The plaintiffs had made bookings in respect of lots on the land and had signed booking applications which contained the terms and conditions of booking. Application was made for subdivision of the lands but approval was given subject to a reservation of certain lots for bumiputra. The plaintiffs sued for specific performance of the sale of the lots of the land. The defendants claimed that the actions should be dismissed because (1) there was no concluded contract on which an action would lie; (2) even if there was a concluded contract, the special condition imposed made the performance of the contract impossible and/or unlawful and that therefore further performance of it was excused and (3) (in respect of some of the lands) as the defendants were not the registered owners of the land when the bookings were made, even if the bookings made by them amount to concluded contracts, such contracts were illegal by virtue of rule 11(1) of the Housing Developers (Control and Licensing) Rules, 1970.

Held: (1) the defendant's contention that there was no concluded contract fails as there was a booking document which contained the terms and conditions of the booking and the parties are deemed to have approved the printed sale and purchase agreement setting out the terms and conditions of sale;

(2) the special conditions in this case were not endorsed on the title deeds and even if they could be said to have been imposed when the approval was given, they could be said to have been withdrawn before the qualified titles were issued. Even if the special conditions were imposed and not withdrawn, the defendants cannot invoke their existence to avoid their liabilities under the contracts;

(3) the defendants should have known that in applying for conversion and subdivision the authorities could impose terms and conditions. They could have inserted an express condition that the discharge of their obligations would be dependant on the approval to be obtained from the land office but they did not do so. On the facts of the case the defendants took the risk of contracting to supply each of the purchasers with a sub-lot with a building duly erected thereon without qualification save one that the building to be erected on the sublot was subject to "approval by the local authority or authorities;

(4) in this case it was not possible to read into the contract a further qualification of an implied term that the contract need only be performed by the defendants if they ended by having all the lots for disposal. The defendants are not excused from performance;

(5) in this case the defendants by inviting the pur-